SKS Die Casting & Machining, Inc., SKS Die Casting & Machining, Inc., Debtor-in-Possession *and* Bay Area District Lodge No. 115, International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 32–CA–8053 and 32–CA–8950

April 22, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On May 31, 1989, the National Labor Relations Board issued its Decision and Order (294 NLRB 372) in the above-entitled proceeding in which the Board, inter alia, found that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate employees who became economic strikers on May 5, 1986, and offered unconditionally to return to work on May 9, 1986. The Board further found that the Respondent's refusal to reinstate the economic strikers, and its stated refusal to bargain in a May 11, 1986 letter to the Union, converted the economic strike into an unfair labor practice strike. The Respondent's subsequent refusal to reinstate the strikers following the Union's second unconditional offer, on March 16, 1987, to return them to work was also found to have violated Section 8(a)(3) and (1). The Board accordingly ordered all the strikers to be reinstated, with backpay from the time of their application to return to work, because the Respondent had failed to meet its burden of showing that any of the strikers were permanently replaced.

Thereafter, the Respondent petitioned the United States Court of Appeals for the Ninth Circuit for review, and the General Counsel cross-petitioned for enforcement, of the Board's Decision and Order. On August 13, 1991, the court (941 F.2d 984) affirmed the Board's 8(a)(3) and (1) findings of violations, reversed the finding that none of the economic strikers were permanently replaced prior to their May 9, 1986 unconditional offer to return, and remanded the case to the Board for resolution of the strikers' *Laidlaw*[1] rights.

The court found that the General Counsel had conceded that eight permanent replacements had been hired for eight of the strikers and so rejected the Board's reliance on the Respondent's failure of proof as to those eight.[2] In addition, the court accepted the General Counsel's assertion that on May 9 the Respondent's only reinstatement obligation was to the 11 unreplaced economic strikers, but that a high turnover rate among replacements resulted in vacant positions that the Respondent was then obligated to offer to the replaced strikers. The court accordingly remanded the case to the Board for a determination of the effect of replacement turnover and resolution of the dates from which those strikers are entitled to reinstatement and backpay at the compliance stage of the proceeding.[3]

The Board has delegated its authority in this proceeding to a three-member panel.[4]

The Board has reviewed its Decision and Order in light of the court's remand and accepts as the law of this case the court's finding that the Respondent hired eight permanent replacements for strikers prior to the strikers' May 9, 1986 unconditional offer to return. We agree with the court that it is essential to determine at the compliance stage of this proceeding which permanent replacements filled which jobs, for whom, and for how long,[5] and we shall accordingly remand this case to the Regional Director for the purpose of instituting a compliance proceeding to resolve the reinstatement and backpay rights of all the strikers.

With regard to the court's direction[6] that we formulate a ''separate remedy'' for strikers refused reinstatement upon their second unconditional offer to return, made on March 16, 1987 (by which time the strike had converted to an unfair labor practice strike), we direct that due consideration be given in such compliance proceeding to the strikers' status as unfair labor practice strikers after May 11, 1986. We note, however, that this has virtually no practical significance here.

The permanent replacement of eight strikers discussed above was not affected by the strike's conversion because those replacements were hired *before* the strike converted to an unfair labor practice strike.[7] Although unfair labor practice strikers who unconditionally offer to return are entitled to immediate reinstate-

[1] *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[2] The court relied on an admission in the General Counsel's brief to the Board which stated that ''beginning around May 6 [Respondent] proceeded to hire *permanent replacements* for the strikers.'' 941 F.2d at 990.

[3] The court, further noting the Board's failure to order a separate remedy for SKS' March 16, 1987 refusal to reinstate unfair labor practice strikers, also remanded that matter for formulation of a remedy for the Respondent's refusal to grant the unfair labor practice strikers their reinstatement rights as of March 16, 1987, ''if the Board should find that there are some strikers who had not become entitled to reinstatement at an earlier date.''

[4] Members Oviatt and Raudabaugh did not participate in the Board's underlying decision.

[5] We note that it is unclear on the present record the extent to which the eight permanent replacements were at all relevant times assigned jobs previously performed by strikers or whether the replacements were reassigned production duties which had not previously been performed by the replaced strikers. In this respect, we note that the record in the underlying proceeding contains documents of the Respondent which highlight the disparities between the job classifications of the permanent hires listed in R. Exhs. 11 and 12 and those of the striking employees set forth in the Respondent's May 5, 1986 posting entitled ''Proposed Wages for SKS Employees'' (G.C. Exh. 8). These are matters that should be explored further in the compliance proceeding.

[6] See fn. 3, supra.

[7] The record is inadequate to determine if any of these replacements still were employed by the Respondent as of March 16, 1987.

ment even when this necessitates the discharge of replacements, that entitlement applies only to (1) permanent replacements hired *during the unfair labor practice strike*, or (2) temporary replacements hired at any time. *Wilder Construction*, 276 NLRB 977, 982 (1985), enfd. 804 F.2d 1122 (9th Cir. 1986). An employer need not discharge replacements to whom it made offers of permanent employment during an economic strike, even if the strike and the strikers thereafter convert to unfair labor practice status. With respect to any such previously filled positions, unfair labor practice strikers, like economic strikers, are entitled simply to be placed on a preferential rehire list. Id. Thus, after the strike at issue in this case converted on May 11, 1986, the Union's outstanding unconditional offer for the return of the strikers obligated the Respondent to reinstate them immediately to any of their former prestrike positions (or substantial equivalents) that (1) were occupied by temporary replacements, (2) were occupied by permanent replacements hired after May 11, 1986, or (3) became vacant by virtue of the departure of replacements, whether permanent or temporary. Therefore, with respect to the eight positions in question, the strikers were entitled to immediate reinstatement only upon the replacements' departure, and backpay will accordingly not begin running before that date regardless of the status of the strikers.

ORDER

The National Labor Relations Board orders that this case is remanded to the Regional Director for Region 32 for the purpose of instituting compliance proceedings consistent with this Supplemental Decision and Order.